No. 92-8346

In the Supreme Court of the United States

OCTOBER TERM, 1993

TERRY LEE SHANNON, PETITIONER

v.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES

DREW S. DAYS, III
Solicitor General

JO ANN HARRIS
Assistant Attorney General

WILLIAM C. BRYSON
Deputy Solicitor General

AMY L. WAX
Assistant to the Solicitor General

DEBORAH WATSON
Attorney

Department of Justice
Washington, D.C. 20530
(202) 514-2217

36 pp

QUESTION PRESENTED

Whether petitioner's conviction should be reversed because the district court failed to instruct the jury on the consequences of returning a verdict of not guilty by reason of insanity.

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OPINION BELOW

The opinion of the court of appeals (J.A. A29-A42) is reported at 981 F.2d 759.

JURISDICTION

The judgment of the court of appeals was entered on January 12, 1993. The petition for a writ of certiorari was filed on April 12, 1993, and was granted on November 1, 1993. The jurisdiction of this Court rests upon 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the Northern District of Mississippi, petitioner was convicted of possession of a firearm by a convicted felon, in violation of 18 U.S.C. 922(g)(1). Because he was qualified

as an armed career offender under 18 U.S.C. 924(e), petitioner was sentenced to 15 years' imprisonment, to be followed by a three-year period of supervised release. The court of appeals affirmed. J.A. A29-A42.

1. At about 4 a.m. on August 25, 1990, a police officer stopped petitioner on a street in Tupelo, Mississippi. The officer told petitioner that a detective wanted to speak with him and asked petitioner to accompany him to the police station. Petitioner stated that he did not want to live anymore, walked across the street, pulled out a pistol, and shot himself in the chest. Petitioner eventually recovered from the wound. J.A. A30.

Petitioner was charged with unlawful possession of a firearm. At trial, he raised an insanity defense. J.A. A30-A31. He asked the district court to give one of the following two instructions to the jury:

> (1) "In the event it is your verdict that [petitioner] is not guilty only by reason of insanity, it is required that the Court commit [petitioner]," or
>
> (2) "[Y]ou should know that it is required that the Court commit [petitioner] to a suitable hospital facility until such time as [petitioner] does not pose a substantial risk of bodily injury to another or serious danger to the property of another."

J.A. A32 n.3. Although the district court instructed the jury on the insanity defense, the court declined to give either of the proposed instructions on the effect of a verdict of not guilty by reason of insanity (NGI verdict). *Id.* at A32. Instead, the court instructed the jurors that it was their duty to base their verdict solely on the evidence, without prejudice or sympathy; that they should apply the law as explained by the court without regard to the consequences of the verdict; and that the question of punishment was for the court to

decide and should not enter the jury's consideration or discussion. J.A. A27-A28.

2. The court of appeals affirmed. J.A. A29-A42. The court noted "[t]he well-established general principle * * * that a jury has no concern with the consequences of its verdict." *Id.* at A33, citing *Rogers* v. *United States*, 422 U.S. 35, 40 (1975). Relying on prior circuit precedent, the court held that the district court properly refused to instruct the jury on the effect of an NGI verdict. Such instructions, the court explained, "tend to draw the attention of the jury away from their chief function as sole judges of the facts, open the door to compromise verdicts and to confuse the issue or issues to be decided." J.A. A35-A36, quoting *Pope* v. *United States*, 298 F.2d 507, 508 (5th Cir. 1962), cert. denied, 381 U.S. 941 (1965). Absent a statutory requirement that juries be granted a role in sentencing, the court held, "we adhere to the established axiom that it is inappropriate for a jury to consider or be informed about the consequences of its verdict." J.A. A39.

SUMMARY OF ARGUMENT

Under the Insanity Defense Reform Act of 1984 (IDRA), a defendant who is found not guilty by reason of insanity must be civilly committed until he can establish that his release would not create a substantial risk of bodily injury to others or serious damage to the property of others. Neither the IDRA nor principles of federal common law, however, require courts to instruct juries about the consequences of a verdict of not guilty by reason of insanity.

A. The IDRA provides for a verdict of not guilty by reason of insanity, but it contains no provision requiring that juries be instructed as to the consequences of such a verdict. Although the Senate Committee that reported the bill that became the IDRA endorsed the procedure followed in the

District of Columbia, where such an instruction was regularly given, that "endorsement" was not accompanied by any statutory provision or rule change that imposed a legal duty on courts to take such action. Nor is it fair to conclude that by enacting the IDRA, Congress intended to adopt the judicial construction of the D.C. Code provision that was one of the sources on which the IDRA was based. The IDRA was similar to a number of state insanity statutes as well, including some that had been construed *not* to require an instruction on the consequences of an NGI verdict. This is therefore not a case in which Congress adopted a statutory formulation from another jurisdiction and can be assumed to have adopted the judicial construction of the borrowed statute as well.

B. Nor is there any reason in the general principles of federal criminal practice to impose on district courts a blanket obligation to instruct juries on the consequences of an NGI verdict.

1. There is no empirical support for the assumption that jurors harbor the suspicion that defendants acquitted by reason of insanity will be immediately released into the community. There is therefore no need to instruct the jury in order to correct the jurors' assumed misapprehension on that point. Nor is there any reason to indulge a second assumption, also necessary to petitioner's argument, that jurors will be unable or unwilling to follow the court's instructions not to consider the effect of their verdict and to confine themselves to deciding the question of guilt based on the evidence in the record. It is a well-established principle of our system of jury trials that jurors are assumed to be able to follow the court's instructions, including instructions to decide questions of guilt without regard to the consequences of the verdict. It would be anomalous to hold that, in order to ensure that jurors will abide by that responsibility, they must first be instructed as to

the consequences of their verdict and then be directed to disregard, in deciding the case, what they have just been told.

2. An instruction about the consequences of an NGI verdict would be likely to distract the jury and add to the risk of a compromise verdict based on the jury's consideration of the consequences of its decision. An instruction regarding the consequences of the verdict would make it more likely that the jury would focus on that issue. If the jurors had doubts as to the defendant's guilt, but nonetheless considered him dangerous, the instruction could lead them to opt in favor of an NGI verdict, rather than an acquittal, in order to ensure that the defendant would not be released into the community. Or, if the jurors doubted that the defendant was insane but believed that the defendant nonetheless needed treatment, the instruction could lead them to decide in favor of an NGI verdict rather than a conviction. In either case, the instruction would have a distorting effect on the jury's deliberations.

3. In some circumstances, an instruction on the consequences of an NGI verdict may be appropriate. For example, if an attorney or witness has suggested that the defendant would be released upon an NGI verdict, or if there is some other indication in the record that the jury may be laboring under that impression, it would be proper for the court to instruct the jury in a way that corrects that misunderstanding. That is a matter, however, that should be left to the discretion of the district court in appropriate cases. It should not be addressed by this Court's creation of a blanket rule requiring that the jury be instructed on the consequences of an NGI verdict in every case.

4. Nothing in the record in this case called for the district court to instruct the jury as to the consequences of an NGI verdict. There was no suggestion from any attorney or wit-

ness that the defendant would be released if he were found not guilty by reason of insanity. And there was no indication in any question from the jury or otherwise that the jury labored under a misimpression as to the consequence of an NGI verdict that needed to be corrected in order to ensure that the jury's deliberations would not be skewed by improper considerations.

ARGUMENT

THE DISTRICT COURT PROPERLY REFUSED TO INSTRUCT THE JURY ON THE EFFECT OF A VERDICT OF NOT GUILTY BY REASON OF INSANITY

A. The Insanity Defense Reform Act Does Not Require A District Court To Instruct The Jury On The Effect Of A Verdict Of Not Guilty By Reason Of Insanity

Petitioner argues that the Insanity Defense Reform Act of 1984 (IDRA), Pub. L. No. 98-473, Tit. II, § 403(a), 98 Stat. 2057 (codified at 18 U.S.C. 17, 4241-4247), requires district courts to instruct the jury on the effect of a verdict of not guilty by reason of insanity in every case in which an insanity defense is raised. There is no provision in the statute, however, that mandates an instruction to the jury on the consequences of an NGI verdict. Nor is there any other authority in any statute or rule that requires such an instruction. Moreover, the rule petitioner proposes is contrary to the settled principle that the jury's sole function is to determine the guilt or innocence of the defendant based on the evidence introduced at trial, and that the jury should not concern itself with the possible punishment or other consequences of its verdict. No court of appeals has interpreted the IDRA to require an instruction of the sort petitioner requested,[1] and this Court should not do so either.

[1] The courts have rejected arguments that an instruction regarding the consequences of an NGI verdict must be given in every case, although they have recognized that giving such an instruction is within the district court's discretion in appropriate circumstances. See *United States* v. *Fisher*, No. 93-7002 (3d Cir. Nov. 10, 1993), petition for cert. pending, No. 93-7000 (filed Dec. 8, 1993); *United States* v. *Thigpen*, 4 F.3d 1573 (11th Cir. 1993) (en banc), petition for cert. pending, No. 93-6747 (filed Nov. 15, 1993); *United States* v. *Blume*, 967 F.2d 45, 49 (2d Cir. 1992); *United States* v. *Frank*, 956 F.2d 872, 878-882 (9th Cir. 1991), cert. denied, 113 S. Ct. 363 (1992). A panel of the Eighth Circuit held such an instruction required by the IDRA, but that opinion was vacated when the Eighth Circuit granted rehearing en banc, and the appeal was subsequently dismissed. *United States* v. *Neavill*, 868 F.2d 1000, 1002-1004 (8th Cir.), rehearing en banc granted, 877 F.2d 1394, appeal dismissed, 886 F.2d 220 (1989).

1. *Neither The IDRA Nor Its Legislative History Requires A District Court To Instruct The Jury Regarding The Consequences Of An NGI Verdict*

Prior to the enactment of the IDRA, federal law did not provide for a verdict of not guilty by reason of insanity. Defendants who mounted a successful insanity defense were simply found "not guilty." See *Evalt* v. *United States*, 359 F.2d 534, 544-545 (9th Cir. 1966). Nor was there any federal provision for the confinement and treatment of defendants who were acquitted by reason of insanity. *Ibid.* Rather, the treatment such defendants received following an insanity acquittal depended on the willingness of state authorities to institute separate civil commitment proceedings. *United States* v. *Blume*, 967 F.2d 45, 51 (2d Cir. 1992) (Newman, J., concurring); *United States* v. *McCracken*, 488 F.2d 406, 416-417 (5th Cir. 1974); *United States* v. *Alvarez*, 519 F.2d 1036, 1048 (3d Cir. 1975); S. Rep. No. 225, 98th Cong., 1st Sess. 239, 241 (1983).

Before the IDRA was passed, the federal courts of appeals, with the exception of the District of Columbia Circuit, disapproved instructions to the jury concerning the disposition of a defendant acquitted by reason of insanity See *United States* v. *Portis*, 542 F.2d 414, 420-421 (7th Cir. 1976);

United States v. *Alvarez*, 519 F.2d at 1047-1048; *United States* v. *McCracken*, 488 F.2d at 422; *United States* v. *Borum*, 464 F.2d 896, 900-901 (10th Cir. 1972); *Pope* v. *United States*, 372 F.2d 710, 731 (8th Cir.) (en banc) (Blackmun, J., vacated on other grounds, 392 U.S. 651 (1967); *Evalt* v. *United States*, 359 F.2d at 544-547. The courts' decisions rested on the principle that a jury should base its verdict solely on the evidence and should not give any consideration to the defendant's punishment or the consequences of the verdict. See *Rogers* v. *United States*, 422 U.S. at 40 (jury should be advised to reach its verdict without regard to the sentence to be imposed). Thus, courts did not advise the jurors of the consequences of an acquittal when that acquittal was based on a defense of insanity, and prosecutors were forbidden to argue to the jury that an acquittal would result in the defendant's release. See *Evalt* v. *United States*, 359 F.2d at 546.

In *Lyles* v. *United States*, 254 F.2d 725 (D.C. Cir. 1957) (en banc), cert. denied, 356 U.S. 961 (1958), the District of Columbia Circuit construed D.C. Code Ann. § 24-301 (1951), an insanity defense statute applicable only in the District of Columbia. That statute expressly authorized an NGI verdict and provided for the commitment of a defendant acquitted by reason of insanity. The court in *Lyles* held that a trial court must instruct a jury that an NGI verdict would result in the hospitalization of the defendant. The court concluded that because jurors knew from common knowledge the effect of a verdict of guilty or not guilty, they should similarly be advised of the effect of a verdict of not guilty by reason of insanity. 254 F.2d at 728.

When Congress enacted the IDRA in 1984, it made several changes in the federal insanity defense. First, it narrowed the defense by defining insanity as the lack of substantial capacity to appreciate the wrongfulness of one's act. 18 U.S.C.

17(a).[2] Second, the Act made insanity an affirmative defense by shifting the burden of proving insanity to the defendant. *Ibid.* Finally, the Act provided for a verdict of not guilty by reason of insanity and for the commitment of defendants receiving that verdict. See 18 U.S.C. 4242-4243.[3]

The 1984 Act contained no provision requiring district courts to instruct a jury on the effect of a verdict of not guilty by reason of insanity. Nonetheless, petitioner argues (Br. 11, 20-21) that the IDRA mandates that the requested instruction be given; in so doing, he does not rely on anything in the text of the statute, but points to a passage in the Senate report on the statute of which the IDRA was a part. The report states in pertinent part:

> The Committee endorses the procedure used in the District of Columbia whereby the jury, in a case in which

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[2] The current federal definition of insanity is significantly narrower than that found in the American Law Institute's Model Penal Code, which defines insanity either as the lack of substantial capacity to appreciate the wrongfulness of one's act or the lack of substantial capacity to conform one's conduct to the requirements of the law. See Model Penal Code § 4.01 (1985).

[3] A defendant found not guilty by reason of insanity is held in custody pending a civil commitment proceeding within 40 days of the verdict. 18 U.S.C. 4243(c). At the hearing, the defendant must establish that his release would not create a substantial risk of bodily injury to another or serious damage to the property of another due to a present mental disease or defect. 18 U.S.C. 4243(d). If the defendant fails to make that showing, he must be committed to the custody of the Attorney General so that appropriate arrangements can be made for his custody, care, and treatment. 18 U.S.C. 4243(e). When the director of the facility in which the defendant is hospitalized determines that he would no longer pose a substantial risk of bodily injury to another person or of serious damage to the property of another, he must file a certificate to that effect with the court. The court must then order the defendant discharged, or, on motion of the government, hold a hearing in order to determine whether the standard for release has been met. 18 U.S.C. 4243(f).

> the insanity defense has been raised, may be instructed on the effect of a verdict of not guilty by reason of insanity. If the defendant requests that an instruction not be given, it is within the discretion of the court whether to give it or not.

S. Rep. No. 225, 98th Cong., 1st Sess. 240 (1983) (footnotes omitted).

The problem with petitioner's argument is that the committee's "endorsement" of the practice of instructing on the effect of a verdict of not guilty by reason of insanity was not incorporated into the statute. While a committee report may shed light on unclear statutory terms, legislators' remarks "cannot serve as an independent source having the force of law." *United States* v. *Frank*, 956 F.2d 872, 881-882 (9th Cir. 1991), cert. denied, 113 S. Ct. 363 (1992); see also *United States* v. *Blume*, 967 F.2d at 53 (Winter, J., concurring) ("a statement in a Committee report, however clear it may be, does not have the force of law where the statute itself lacks any relevant provision"); *United States* v. *Fisher*, No. 93-7002 (3d Cir. Nov. 10, 1993), slip op. 11 (quotations omitted) ("courts have no authority to enforce principles gleaned solely from legislative history that has no statutory reference point"), petition for cert. pending, No. 93-7000 (filed Dec. 8, 1993).[4]

2. *The IDRA Did Not Adopt The Judicial Interpretation Of The District Of Columbia Statute On The Insanity Defense*

Petitioner also contends (Br. 11, 18-22) that Congress modeled the IDRA on D.C. Code Ann. § 24-301 (1981) and

[4] In any event, the language used in the quoted passage is precatory, not mandatory, and it can be interpreted as endorsing a case-by-case determination whether to give such an instruction, rather than a rigid rule that such an instruction must be given in every case in which the defendant requests it.

intended to "adopt not only the statute itself, but the settled judicial interpretation placed on that statute." Accordingly, he argues that Congress adopted the D.C. Circuit's construction of D.C. Code Ann. § 24-301, in which the court directed that the jury be instructed on the consequences of an NGI verdict.

Petitioner relies on the principle of statutory construction that, where a legislature has "borrowed from [a] statute[ ]" that has received "a known and settled construction before [its] enactment by Congress, that construction must be deemed to have been adopted by Congress together with the text which it expounded." *Capital Traction Company* v. *Hof*, 174 U.S. 1, 36 (1899). See also *Carolene Products Co.* v. *United States*, 323 U.S. 18, 26 (1944) ("[T]he general rule [is] that adoption of the wording of a statute from another legislative jurisdiction carries with it the previous judicial interpretations of the wording."); *Cathcart* v. *Robinson*, 30 U.S. (5 Pet.) 263, 279 (1831) (same); 2B N. Singer, *Sutherland Statutory Construction* § 52.02, at 198 (5th ed. 1992). A corollary of that principle, however, is that "[t]he strength of the presumption in favor of the foreign construction varies with the similarity between the foreign and domestic acts." *Id.* at 199. See also *Carolene Products Co.*, 323 U.S. at 26 (the presumption of legislative intention "varies in strength with the similarity of the language" and with "other indicia of intention"). Where the adoption is only of a "general scheme," the construction of the parent jurisdiction "is not considered controlling." 2B N. Singer, *supra*, § 52.02, at 199.

Congress did not "adopt" the District of Columbia's insanity defense statute when it enacted the IDRA. The IDRA was the product of extensive hearings and a legislative compromise between abolition of the insanity defense and retention of the defense in its then-current form. See S. Rep. No. 225, 98th Cong., 1st Sess. 222-224 (1983). To be sure, Con-

gress was aware of the previously enacted D.C. Code provisions governing NGI verdicts and commitment. See S. Rep. No. 225, *supra*, at 240 n.67, 241 & nn.73 & 76. But Congress departed in a number of significant ways from the District of Columbia's statutory scheme. For example, the IDRA requires the defendant to prove insanity by clear and convincing evidence (18 U.S.C. 17), whereas the District of Columbia statute requires only that the defendant establish insanity by a preponderance of the evidence. D.C. Code Ann. § 24-301(j) (1981). Under the IDRA, a defendant seeking to secure his release following a verdict of not guilty by reason of insanity must establish his right to release by clear and convincing evidence if his offense was a crime of violence (18 U.S.C. 4243(d)); under the District of Columbia provision, the defendant must make his case for release only by a preponderance of the evidence. D.C. Code Ann. § 24-301(k)(3) (1981). A federal defendant seeking to secure his release following commitment must establish only that he is not a danger to others or to property (18 U.S.C. 4243(d)); applicants for release in the District of Columbia must prove that they are not dangerous to themselves. D.C. Code Ann. § 24-301(e) (1981). In addition, Congress rejected the "volitional" and "cognitive" formulation of the test for insanity that had been adopted as the governing test under the D.C. Code provision. See *United States* v. *Brawner*, 471 F.2d 969, 973-995 (D.C. Cir. 1972). The IDRA defines insanity more narrowly as the lack of substantial capacity to appreciate the wrongfulness of one's act.

Thus, while the IDRA follows the structure of the D.C. Code insanity defense provision by creating three possible verdicts in insanity defense cases, Congress did not by any means simply borrow District of Columbia law for the federal system. Accordingly, the pedigree of the federal statute does not suggest that Congress meant to adopt the D.C. Circuit's decision in *Lyles* as federal law. In fact, because the federal

scheme bore some similarity to the statutory procedures in some States that had rejected the rule that an instruction concerning the consequences of an NGI verdict must always be given, it is no less plausible to conclude that Congress intended to incorporate those courts' construction of their statutes, rather than the D.C. Circuit's gloss on the D.C. Code provision in *Lyles*.[5]

[5] By 1970, all but one State had adopted some form of statutory procedure allowing for the commitment of a defendant acquitted by reason of insanity, although the statutes varied considerably. See Note, *Criminal Procedure—Defendant's Right to Jury Instruction On Consequences of Verdict of Not Guilty By Reason of Insanity*, 16 Wayne L. Rev. 1197, 1198 n.4 (1970). Between 1970 and 1984, the state courts laid down a variety of rules concerning the propriety of instructing the jury on the consequences of an NGI verdict. See Comment, *The Not Guilty by Reason of Insanity Verdict: Should Juries be Informed of Its Consequences?*, 72 Ky. L.J. 207, 211-217 & nn.24-40 (1983-1984). Some courts concluded that the instruction must always be given, others ruled that it must be given at the defendant's request, others held that no instruction should be given except to correct a testimonial or prosecutorial misrepresentation, and a few ruled that the matter should be left to the trial judge's discretion. *Id.* at 211-212; Annotation, *Instructions in State Criminal Case in Which Defendant Pleads Insanity as to Hospital Confinement in Event of Acquittal*, 81 A.L.R. 4th 659, 659-697 (1990) (documenting division in authority). By the time the IDRA was enacted, most of the States either forbade the instruction or allowed it to be given in the trial judge's discretion. See *Government of the Virgin Islands* v. *Fredericks*, 578 F.2d 927, 934-935 & n.11 (3d Cir. 1978). The position in *Lyles* continues to represent the minority view. See J. Lui, *Federal Jury Instructions and the Consequences of a Successful Insanity Defense*, 93 Colum. L. Rev. 1223, 1236 n.29 (1993) (majority of the state courts hold that instruction should generally not be given).

B. District Courts Should Not Be Required To Instruct The Jury In Every Case As To The Consequences Of A Verdict Of Not Guilty By Reason Of Insanity

1. *Jurors Can Be Expected To Follow Instructions Not To Consider the Consequences Of Their Verdict*

Petitioner asserts (Br. 12-13) that a jury should always be informed of the consequences of an NGI verdict, because otherwise jurors are likely to speculate about the consequences of the verdict, and because they may believe that an NGI verdict will result in the release of a potentially dangerous individual.

As an initial matter, petitioner's argument assumes that, unless otherwise informed, jurors will believe that defendants acquitted by reason of insanity will routinely be released into the community. That assumption is unjustified. As the court observed in *United States* v. *Fisher*, slip op. 13 (citation omitted), " 'it is not at all clear' that jurors are generally ignorant of the fact that [defendants acquitted by reason of insanity] may be civilly committed. On the contrary, highly publicized cases, such as that involving John Hinckley, have dramatized the possibility of civil commitment following [an NGI verdict]." See also *United States* v. *Blume*, 967 F.2d at 54 (Winter, J., concurring) (there is no reason to assume that jurors hold the notion that defendants acquitted by reason of insanity are not confined).

The available evidence as to jurors' understanding of the consequences of a verdict of not guilty by reason of insanity fails to support petitioner's assumption that jurors believe that defendants who are found not guilty by reason of insanity will be released. Studies have shown that most jurors correctly assume that the defendant will be committed after an NGI verdict. See G. H. Morris et al., *Whither Thou Goest? An Inquiry into Jurors' Perceptions of the Consequences of a Successful Insanity Defense*, 14 San Diego L. Rev. 1058,

1068 (1977) (survey of jurors who had participated in trials in which an insanity defense was raised); R. Simon, *The Jury and the Defense of Insanity* 94 (1967) (jurors on experimental juries who were not advised of the consequences of an insanity acquittal); B. Schwartz, *Should Juries be Informed of the Consequences of the Insanity Verdict?*, J. Psychiatry & Law 167, 173 & n.51 (Summer 1980) ("the overwhelming majority of jurors already know that the state does not release dangerous persons"); see also J. Lui, *Federal Jury Instructions and the Consequences of a Successful Insanity Defense*, 93 Colum. L. Rev. 1223, 1241 n.91, 1243 & n.101 (1993).[6] There is therefore no reason to accept petitioner's assumption that, absent an instruction as to the consequences of an NGI verdict, juries will harbor the belief that an NGI verdict will result in the defendant's release.

Petitioner's argument that a jury must be instructed about the consequences of an NGI verdict requires the acceptance of a second assumption as well: that jurors who believe an NGI verdict will result in the immediate release of the defendant will be unable or unwilling to follow the court's instruction not to consider the effect of their verdict, and will succumb to the temptation to violate their oaths by basing their verdict on factors other than the evidence adduced at trial. There is no reason to believe that jurors will disregard their instructions in that way.

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[6] Neither petitioner nor his amicus cites any authority to the contrary. Although amicus Coalition for the Fundamental Rights of Ex-patients cites two articles in support of its assertion (Amicus Br. 8 & n.5) that "[m]embers of the public believe that insanity acquittees go free; that they 'beat the rap,' " those articles do not indicate anything about the beliefs of jurors, but simply note that insanity acquittees often spend at least as much time in commitment as they would have spent incarcerated if they had been convicted. See M. Pogrebin et al., *Not Guilty by Reason of Insanity: A Research Note*, 8 Int'l J. of Law and Psychiatry 237 (1986); J. H. Rodriguez et al., *The Insanity Defense Under Siege: Legislative Assaults and Legal Rejoinders*, 14 Rutgers L.J. 397, 402-404 (1983).

An established principle of our jury trial system is that, absent statutory provision to the contrary, the jury determines the defendant's guilt or innocence without regard to considerations of punishment or other consequences of the verdict. *Rogers* v. *United States, supra; United States* v. *Fisher,* slip op. 11; *United States* v. *Thigpen,* 4 F.3d 1573, 1577 (11th Cir. 1993) (en banc), petition for cert. pending, No. 93-6747; *United States* v. *Frank,* 956 F.2d at 879; *United States* v. *Parrish,* 925 F.2d 1293, 1299 (10th Cir. 1991); *United States* v. *Goodface,* 835 F.2d 1233, 1237 (8th Cir. 1987); *United States* v. *Greer,* 620 F.2d 1383, 1385 (10th Cir. 1980); *id.* at 1386 (Doyle, J. concurring); *Pope* v. *United States,* 372 F.2d at 731. Jurors are routinely admonished to base their verdict solely upon the facts, the law, and the judge's instructions. In fact, jurors are typically warned that they would violate their oaths if they considered the possible punishment or other consequences of the verdict. See *United States* v. *Fisher,* slip op. 11; *Rogers* v. *United States,* 422 U.S. at 40 (jury should have been admonished "that the jury had no sentencing function and should reach its verdict without regard to what sentence might be imposed").[7]

Rules for instructing juries are based on the assumption that jurors will follow their instructions, not on the assumption that they will disregard them. That assumption incorporates the view that juries "do not consider and base their

[7] See E. Devitt, C. Blackmar, M. Wolff & K. O'Malley, *Federal Jury Practice and Instructions* § 10.01 (4th ed. 1992) (instruction to the jury that "you are not to concern yourself in any way with the sentence which the defendant might receive"); 1 L. Sand, J. Siffert, W. Loughlin & S. Reiss, *Modern Federal Jury Instructions—Criminal* § 9.01 (1993). See also, *e.g.*, Sixth Circuit Pattern Jury Instruction 8.05 (1991); *United States* v. *Frank,* 956 F.2d at 879; *United States* v. *Greer,* 620 F.2d at 1386 (Doyle, J., concurring); *United States* v. *Briscoe,* 574 F.2d 406, 408 (8th Cir.), cert. denied, 439 U.S. 858 (1978); *United States* v. *Davidson,* 367 F.2d 60, 63 (6th Cir. 1966).

decisions on legal questions with respect to which they are not charged." *City of Los Angeles* v. *Heller,* 475 U.S. 796, 798 (1986). This Court has refused to engage in the "unfounded speculation that * * * jurors disregarded clear instructions of the court in arriving at their verdict." *Opper* v. *United States,* 348 U.S. 84, 95 (1954). To do so would violate "[o]ur theory of trial," which "relies upon the ability of a jury to follow instructions." *Ibid.*

Applying this fundamental premise, the Court has held, for example, that a defendant's rights were not abridged by the admission, during the guilt phase of a trial, of a prior conviction that was admissible solely for sentencing purposes. See *Spencer* v. *Texas,* 385 U.S. 554 (1967). To say that limiting instructions are constitutionally inadequate to protect against the possible prejudicial effects of such evidence, the Court held, "would make inroads into th[e] entire complex code of state criminal evidentiary law, and would threaten other large areas of trial jurisprudence." *Id.* at 562. The Court refused to take such a step, holding that "the jury is expected to follow instructions in limiting this evidence to its proper function." *Ibid.*

The Court reaffirmed that view in *Marshall* v. *Lonberger,* 459 U.S. 422 (1983), where it upheld the admission, at the guilt phase of a capital case, of a prior conviction that was admissible only to show that the defendant deserved the death penalty. In so holding, the Court expressly noted that "the trial judge gave a careful and sound instruction requiring the jury to consider respondent's prior conviction only for [sentencing] purposes." 459 U.S. at 438-439 n.6.

The Court likewise adhered to the premise that jurors follow their instructions, when it rejected the "dubious" and "speculative assumption[ ]" that jurors would use a defendant's silence at trial against him, despite instructions not to do so, see *Lakeside* v. *Oregon,* 435 U.S. 333, 340

(1978);[8] in refusing to find that a majority of the jurors would ignore an instruction to find guilt beyond a reasonable doubt simply because three of their number favored acquittal, see *Johnson* v. *Louisiana*, 406 U.S. 356, 360-361 (1972); and in refusing to assume that the jury "misunderstood or disobeyed" the instructions of the trial judge to consider the evidence against each defendant separately, see *United States* v. *Lane*, 474 U.S. 438, 450 n.13 (1986).

To be sure, in *Bruton* v. *United States*, 391 U.S. 123 (1968), the Court held that "there are some contexts in which the risk that the jury will not, or cannot, follow instructions is so great, and the consequences of failure so vital to the defendant, that the practical and human limitations of the jury system cannot be ignored." 391 U.S. at 135. The Court in that case held that limiting instructions will not suffice "where the powerfully incriminating extrajudicial statements of a co-defendant, who stands accused side-by-side with the defendant, are deliberately spread before the jury in a joint trial." *Id.* at 135-136. The Court made clear, however, that *Bruton* was a narrow exception to the general assumption that juries can and will follow the court's instructions. In *Richardson* v. *Marsh*, 481 U.S. 200 (1987), the Court emphasized the limited reach of *Bruton*, holding that the admission of a nontestifying co-defendant's confession did not violate the defendant's Confrontation Clause rights where the trial court instructed the jury not to consider the confession against the defendant and the confession was redacted to eliminate any reference to her. The Court assumed that the defendant would have been harmed by the co-defendant's confession if the jury had disobeyed its instructions not to consider the confes-

[8] The Court observed in *Lakeside* that "we have not yet attained that certitude about the human mind which would justify us in * * * a dogmatic assumption that jurors, if properly admonished, neither could nor would heed the instructions of the trial court." 435 U.S. at 340 n.11, quoting *Bruno* v. *United States*, 308 U.S. 287, 294 (1939).

sion against the defendant, 481 U.S. at 208 n.3, but it found no reason to depart from the "almost invariable assumption of the law that jurors follow their instructions," 481 U.S. at 206.

Where the insanity defense is at issue, there is no reason to cast aside the ordinary presumption that a jury will follow instructions to decide the case on the evidence and to refrain from considering the effect of the verdict. First of all, the task of disregarding the consequences of a verdict is not so inherently difficult as to overwhelm the average juror's will or ability to follow instructions and abide by the juror's oath. There are other circumstances in which it may require just as much effort for a juror to follow the court's instructions, but in which our judicial system necessarily assumes that the juror will honor his oath to determine the defendant's guilt or innocence based solely on the evidence. For example, if the government has failed to meet its burden of proof at trial, jurors are expected to return a verdict of not guilty, even if they are convinced that the defendant is dangerous and should be incarcerated.

Moreover, it is doubtful whether an instruction concerning the consequences of a verdict of not guilty by reason of insanity would allay the fears of those jurors willing to violate their oaths and convict a defendant, whom they believe to be not guilty by reason of insanity, solely in order to prevent his release. As the court observed in *United States* v. *Fisher*, slip op. 13: "[I]f the members of a jury are so fearful of a particular defendant's release that they would violate their oaths by convicting him solely in order to ensure that he is not set free, it is questionable whether they would be reassured by anything short of an instruction strongly suggesting that the defendant, if found [not guilty by reason of insanity], would very likely be civilly committed for a lengthy period." Yet an accurate instruction about the consequences of a such a verdict would not provide such assurance. Under

the IDRA, a defendant who has been found not guilty by reason of insanity is entitled to a release hearing within 40 days of the verdict, and may be released as soon as the hearing is completed. 18 U.S.C. 4243(a)-(e). "The only mandatory period of confinement, therefore, is the period between the verdict and the hearing, which may be held at any time within forty days." *United States* v. *Fisher*, slip op. 14, quoting *United States* v. *Blume*, 967 F.2d at 54 (Winter, J., concurring). And while the defendant is entitled to be released only if he satisfies the court that his release would not create a substantial risk of bodily injury to another person or of serious damage to the property of another, a jury in an insanity case would have no way of predicting whether or when the defendant will be able to make such a showing. *United States* v. *Fisher*, slip op. 14. "Although the jury in such a case will presumably hear testimony concerning the defendant's sanity at the time of the offense, it will not necessarily hear any testimony bearing on the separate question whether the defendant would pose a danger if released after the verdict." *Ibid.*

Finally, it is anomalous to suggest that a district court must instruct the jury concerning facts that the court must then instruct the jury to disregard. In seeking an instruction as to the consequences of a verdict of not guilty by reason of insanity, the defendant asks, in effect, "that we assume that the jury will disregard its instructions to ignore the consequences of its verdict and then allow erroneous extraneous information to affect its judgment. The cure proposed is to give the jury the correct information, which it should then be instructed to ignore." *Government of the Virgin Islands* v. *Fredericks*, 578 F.2d 927, 936 (3d Cir. 1978); see also *United States* v. *Del Toro*, 426 F.2d 181, 184 (5th Cir.) ("ordinarily there is no reason why the jury should be advised of something that has nothing to do with its duty"), cert. denied, 400 U.S. 829 (1970).

2. An Instruction On The Consequences Of An NGI Verdict Would Distract The Jury From Its Responsibility To Return A Verdict Based On The Evidence At Trial

A rule that juries must be informed of the consequences of an NGI verdict would also create the risk of distracting the jury from its task of reaching an accurate verdict. To inform the jury about the consequences of its verdict or the court's sentencing powers "tend[s] to draw the attention of the jury away from their chief function as sole judges of the facts." *Pope* v. *United States*, 298 F.2d 507, 508 (5th Cir. 1962); see also *United States* v. *Blume*, 967 F.2d at 54 (Winter, J., concurring) ("the giving of such an instruction invites juries to ponder matters that are not within their authority and creates a strong possibility of confusion"). Instructions that inform jurors of the consequences of an NGI verdict, whether or not the jurors are already aware of them, force the jury to focus on matters other than the evidence adduced at trial—matters that are irrelevant to the defendant's guilt or innocence. See *United States* v. *Thigpen*, 4 F.3d at 1578 (the instruction "all but invites the jury to consider the likelihood and timing of [the defendant's] release"); *United States* v. *Blume*, 967 F.2d at 54 (Winter, J., concurring) (instruction "all but directs [jurors] to consider the likelihood of a release date, a matter which * * * is none of their business").

In addition, by "highlight[ing] precisely the sort of information—information about the consequences of a verdict—that the jury is not supposed to consider," *United States* v. *Fisher*, slip op. 12, an instruction that calls the jury's attention to the aftermath of the verdict may increase the likelihood of a compromise verdict.[9] A juror who is uncertain

[9] This Court recognized in *Rogers*, 422 U.S. at 40, that there is an increased risk of compromise when the jury's attention is diverted away from the evidence and directed to the consequences of a verdict. There, the Court overturned a conviction on the ground that the district court

whether the defendant committed the charged offense might favor a verdict of not guilty by reason of insanity rather than a verdict of acquittal, on the theory that "[c]ommitting a possibly innocent person is at least not as harsh as imprisoning him; nor is committing a possibly guilty person as dangerous as freeing him." B. Schwartz, *supra*, J. Psychiatry & Law, at 174; *Government of the Virgin Islands* v. *Fredericks*, 578 F.2d at 936. Another juror, who believed the defendant was guilty but needed psychiatric care, might be persuaded to accept an NGI verdict based on the conclusion that the defendant would be provided with treatment if he were civilly committed for a lengthy period. Or, a juror who believed the defendant committed the criminal act but was insane might be persuaded to join a verdict of guilty on the ground that the period of incarceration following a guilty verdict would not be that much more onerous than the period of civil commitment that would result from an NGI verdict. See *United States* v. *Fisher*, slip op. 12 n.7.

Petitioner argues (Br. 13) that juries generally understand the consequences of a verdict of guilty (the defendant will go to jail) and of a verdict of not guilty (the defendant will be released). Accordingly, he contends, juries should also be informed of the consequences of a verdict of not guilty by reason of insanity in order to provide them with the same information concerning the verdict that they already have about the options of "guilty" or "not guilty". See *Lyles* v. *United States*, 254 F.2d at 728 ("[w]e think the jury has the

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should not have responded affirmatively to the jury's inquiry whether it could return a verdict of guilt with a recommendation of "extreme mercy." The Court explained that the district court's response "may have induced [a unanimous guilty verdict] by giving members of the jury who had previously hesitated about reaching a guilty verdict the impression that the recommendation might be an acceptable compromise." 422 U.S. at 40.

right to know the meaning of this possible verdict as accurately as it knows by common knowledge" that "a verdict of not guilty means that the prisoner goes free and that a verdict of guilty means that he is subject to such punishment as the court may impose").

That argument, however, falls with its premise: while juries may have an accurate understanding in the abstract of the consequences of verdicts of guilty and not guilty, those assumptions may be wrong in particular instances. For example, an acquittal will not result in the release of a defendant who is already serving a prison sentence on another charge. If the government in such a case fails in its burden of proof, the jury may nonetheless harbor very real concerns that the defendant is dangerous and should not be released. In that situation, no less than in the instant case, the jury may simply refuse to acquit despite the failure in the government's proof if it believes an acquittal will result in the release of the defendant. Yet no one would suggest that the jury in such a case should be instructed that a verdict of not guilty would not result in the defendant's release because he would remain incarcerated based on his conviction in another case.

Similarly, a jury may be mistaken about the length of time a defendant will serve in prison if he is convicted. The jury may believe, for example, that the offense of conviction carries a short sentence, when, in fact, the prescribed sentence is quite lengthy. Or the jury may be unaware that the offense carries a mandatory sentence that the judge may not reduce based on individual mitigating circumstances. The jury in such cases might be more inclined to convict based upon its mistaken assumption about the punishment that will attach. The possibility of such a mistaken assumption, however, has never been considered a sufficient reason to disturb the settled principle that jurors should not be instructed as to the defendant's possible punishment. In short, the possibility that

the jury may be laboring under a misunderstanding about the penalty that the defendant may face does not warrant an instruction advising the jury about the consequences of its verdict. The result should be no different in cases in which the defendant raises a defense of not guilty by reason of insanity. See *United States* v. *Thigpen*, 4 F.3d at 1578 ("We decline to assume the task of distinguishing those dispositional consequences of which the jury should be advised."); *United States* v. *Frank*, 956 F.2d at 879 (citation omitted) (the rule against instructing the jury applies uniformly to all dispositional issues, including whether "the court may impose [a] minimum or maximum sentence, will or will not grant probation, [or] when a defendant will be eligible for parole").

Because it would be difficult to draw a principled distinction between an instruction concerning the aftermath of an NGI verdict and other instructions about punishment that might aid the defendant, the adoption of petitioner's mandatory rule in this case would open the door to demands from other defendants for analogous instructions in a variety of circumstances. Cf., *e.g.*, M. Heumann and L. Cassak, *Not-So-Blissful Ignorance: Informing Jurors About Punishment in Mandatory Sentencing Cases*, 20 Amer. Crim. L. Rev. 343 (1983) (arguing that juries should be informed of mandatory sentences so as to enhance the possibility of acquittal). The adoption of petitioner's position would therefore threaten the well-established rule that jurors are not to concern themselves with the consequences of their verdict, a principle that is at the core of the division of responsibility in our jury system between the jury and the judge.[10]

[10] That principle, of course, does not apply in the same way when the jury is charged with responsibility for sentencing. Accordingly, this case is not likely to be controlled by the disposition of *Simmons* v. *South Carolina*, No. 92-9059 (argued Jan. 18, 1994), which involves the question whether a sentencing jury in a capital case should be advised of the sentence that would be imposed if the jury decided not to impose the death penalty.

3. The District Court Should Retain Discretion To Advise The Jury Of The Consequences Of An NGI Verdict In Appropriate Circumstances

Because it is impossible to predict, as a general matter, whether providing information about the consequences of an NGI verdict will reduce the risk of verdicts based on compromise or on jurors' mistaken beliefs, this Court should not adopt an inflexible rule mandating such an instruction in every case. See, *e.g.*, B. Schwartz, *supra*, J. Psychiatry & Law, at 175 (Whether "giving or withholding the instruction causes more prejudice" is a question that "admits of no final answer."). That is not to say, however, that there are no circumstances in which such an instruction would be warranted. Courts have acknowledged that the trial judge should consider an appropriate instruction where there is reason to believe that the jury may be influenced by improper considerations. For example, "if a witness or attorney intimates during trial that [an NGI verdict] would endanger the community" by resulting in the defendant's immediate release, see *United States* v. *Fisher*, slip op. 14-15, the judge might wish to give an instruction to correct the erroneous impression engendered by such a statement. See also *United States* v. *Thigpen*, 4 F.3d at 1578 ("If a witness or the prosecutor states or implies that the defendant would be released if found not guilty by reason of insanity, a curative instruction would be appropriate to insure that the jurors are not misled into an erroneous view of the consequences of such a verdict."); *United States* v. *Blume*, 967 F.2d at 54 (Winter, J., concurring) (discretion to give instruction as to consequences of a verdict should be "limited to cases in which the trial judge has reason to believe that a particular jury may think

that insanity acquittees usually go free and that there is some possibility of the jury's acting on that belief"); *Evalt* v. *United States*, 359 F.2d at 544-546 (reversing conviction where the prosecution was allowed to comment that an insanity acquittal would result in the defendant's release); see also *Dipert* v. *State*, 286 N.E.2d 405, 407 (Ind. 1972) (curative instruction appropriate "where an erroneous view of the law on this subject has been planted in [the jurors'] minds"); *State* v. *Huiett*, 246 S.E.2d 862, 864 (S.C. 1978) (permitting curative instruction if needed "to clarify a misstatement of the law"). Likewise, if the jurors' questions reflect concern about what is to become of the defendant, or an inaccurate understanding of the consequences of an NGI verdict, the judge may properly elect to provide the jury with some information on that subject.

Absent such unusual circumstances, the court ordinarily should not give such an instruction, because it is in tension with the general principle that the consequences of the verdict are not the jury's concern. In the end, however, the question whether the circumstances call for a curative instruction should rest in the sound discretion of the trial judge, who is in the best position in a particular case to gauge the need for the instruction and to determine its possible effects.

4. *There Were No Special Circumstances In This Case Requiring An Instruction On The Consequences Of An NGI Verdict*

In this case, the district court did not err in declining to give an instruction as to the consequences of a verdict of not guilty by reason of insanity. There was no suggestion during trial that the return of such a verdict would endanger the community, and the record contains no indication that the jury independently entertained such a notion.

At one point during deliberations, the jury sent a note to the court, stating: "We want you to explain the reason of

insanity." J.A. A9. That inquiry, however, cannot fairly be interpreted as expressing concern about the consequences of an NGI verdict, and petitioner does not argue otherwise. Rather, the jury's question appears merely to seek guidance as to the standard for finding a defendant legally insane. In response to the inquiry, the judge sent the jury a copy of the instructions on the legal definition of insanity and the burdens and standard of proof for the insanity defense. The jury appeared to be satisfied with the answer, as it did not make any further inquiries of the court.

Thus, nothing in this case rebuts the normal assumption that the jury, duly instructed not to consider the consequences of its verdict, followed its oath and returned a verdict based solely on the evidence presented at trial. Under those circumstances, it was not error for the district court to decline to give a further instruction regarding the consequences of an NGI verdict, a matter that was not a proper subject for the jury to consider in reaching its verdict.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

DREW S. DAYS, III
Solicitor General

JO ANN HARRIS
Assistant Attorney General

WILLIAM C. BRYSON
Deputy Solicitor General

AMY L. WAX
Assistant to the Solicitor General

DEBORAH WATSON
Attorney

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